

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

997

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,020

JOHN L. BARRINGER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

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QUESTIONS PRESENTED

- I. Under the facts of this case, were the lack of pre-trial preparation and the inadequacy of representation on the part of the appellant's court appointed trial defense counsel such as to constitute ineffective assistance of counsel?
- II. Did the United States District Court err in denying appellant's motion to vacate or correct the sentence imposed upon him as a result of conviction of count two of robbery?
- III. Is there sufficient evidence to support a conviction on count two of robbery?

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

On April 25, 1966, appellant was indicted on eight counts for offenses arising out of his participation in the holdup of a corner grocery store; counts one and two for alleged violation of 31 Stat. 1322 1961 D. C. Code §22-2901 (robbery); counts three and four for alleged violation of 31 Stat. 1321, 1961 D. C. Code §22-502 (assault with a dangerous weapon); on count five for alleged violation of 79 Stat. 1011, Pub. L. 89-277, §1, 1961 D. C. Code §22-505b (assault on a member of the police force with a dangerous weapon); on count six, for violation of 31 Stat. 1321, 1961 D. C. Code §22-501 (assault with intent to kill); on count seven, for violation of 79 Stat. 1308, Pub. L. 89-347, §1, 1961 D. C. Code §22-403 (malicious destruction of another's movable property);

and on count eight, for violation of 67 Stat. 94, 1961 D. C. Code §22-3204 (carrying a concealed weapon). Appellant pleaded not guilty to all counts on May 6, 1966.

Trial commenced on January 3, 1967. On January 6, 1967, a jury found appellant guilty on all counts and on April 21, 1967, he was sentenced by the District Court as follows:

Three (3) Years to Nine (9) Years on Count 1;
Three (3) Years to Nine (9) Years on Count 2, said sentences to run consecutive to sentence imposed on Count 1;
Three (3) Years to Nine (9) Years on Count 3 said sentence to run concurrently with sentence imposed on Count 1;
Three (3) Years to Nine (9) Years on Count 4, said sentence to run concurrently with sentence imposed on Count 2;
Five (5) Years to Fifteen (15) Years on Count 6, said sentence to run consecutive to sentences imposed on Counts 1 and 2;
Three (3) Years to Nine (9) Years on Count 5, said sentence to run concurrently with sentence imposed on Count 6;
One (1) Year to Three (3) Years on Count 7, said sentence to run consecutive to sentences imposed on Counts 1, 2 and 6;
One (1) Year on Count 8, said sentence to run concurrently with the sentences imposed on Counts 1 and 2, and 6 and 7.

Appellant's affidavit in support of his application to proceed on appeal without prepayment of costs, was timely filed on April 28, 1967 and granted by the District Court on May 10, 1967.

On May 3, 1967, appellant through his court-appointed trial attorney, moved the United States District Court for the District of Columbia to vacate or correct the sentence imposed upon him concerning count two of the indictment. This motion was denied by the Court on June 9, 1967.

On May 31, 1967, this Court appointed the undersigned attorney to represent appellant.

This Court has jurisdiction to hear this appeal pursuant to 62 Statute 929, as amended; 65 Statute 726, as amended; and 72 Statute 348, 28 U.S.C. §1291 (1964).

STATEMENT OF THE CASE

On February 8, 1966, around 6:30 p.m., two men, one armed with a caliber .45 pistol, entered the Somerset Market, a corporate entity operated under the joint proprietorship of Mr. and Mrs. Robert Richman, located at 1501 S Street, N. W. in the District of Columbia. One of the men proceeded to physically assault Mr. Richman and took \$15.00 from his wallet. While this was occurring, the other man was searching for other cash or valuables and finally saw the cash register whose contents Mrs. Richman handed over. The two men then fled out the front door. Mrs. Richman's shouting alerted a police officer, Private Walter Watson, of the Canine Corps who was on duty a short distance away. He and his German Shepard dog pursued these two men down an alley and Watson finally overtook one of the men behind a parked car at the rear of 1726 - 15th Street, N. W.. At this point, the other man turned and fired two shots at the police dog, one proving fatal and two shots at Watson, one striking him on his left side. Watson managed to shoot one of the two fugitives as they were fleeing, but both managed to escape.

At trial, the government produced four witnesses, Mr. and Mrs. Richman, Private Watson and a detective, Mr. Vaccaro, who investigated the incident.

Mr. Richman, after identifying appellant as one of the two men who had held up his store on the night of February 28, testified that around 6:30 p.m. appellant and another man entered the store while he and his wife were closing up (Tr. Vol. I, 43, 44). The following is the account given by Mr. Richman of what subsequently occurred.

A. Someone came in the store. Two people came in the store.

Q. All right. What happened then?

A. He stuck a gun in my back and said, "This is a stick-up; give me your money." I was close to the cash register and I told my wife, I said, "Give it to him." He said, "Well, give me the money you have in your pockets," so I gave him \$15 out of my pockets.

Q. Who said this to you, sir?

A. Number 1, Barringer.

(Tr. Vol. I, 45)

Mr. Richman continued:

Q. Now, you stated that a gun was put into your back?

A. Yes, sir.

Q. To your knowledge, who had the gun in his possession?

A. Barringer. The other one had a sock over his head.

Q. Now, would you please continue?

A. Well, he asked me for some more money and I gave him my \$15 and he pushed me around behind the counter and said, "You have got more." And I said, "I don't have more." He went to the cigar boxes and went to looking around and he called his buddy in from the other side and he said, "Take all the change out of the cash register."

Q. Who said, "Take all the change?"

A. Barringer.

Q. Please continue.

A. So, they went out the door and Mr. Watson was across the street and he came out and my wife hollered and said, "This is a holdup." That's as far as I know.

Q. Now, let's go back and take it a little bit slower, sir. You testified that you gave Mr. Barringer \$15?

A. That's right.

Q. Where did you get this money from, sir?

A. From my pockets, sir.

Q. Now, to your knowledge, how much money was in the cash register at the time?

A. There was around 19 one-dollar bills and some change. I think that's what it was.

Q. Did the defendant Barringer go into the cash register?

A. No, he did not. The other guy did.

Q. Who was the money handed to at that time?

A. The \$15 was handed to Barringer by me and my wife handed it to Number 2 man; the money across the counter and he come behind the counter and got the change out of the cash register.

(Tr. Vol. I, 47, 48)

Mrs. Richman basically corroborated her husband's testimony regarding the circumstances surrounding the robbery and identification of appellant. Her version as to what took place once the two men had entered the store however differs slightly from that of her husband's.

Q. Now, they came into the store -- you kept referring to they -- would you be more specific as to what happened to your husband when the two gentlemen entered the store? As to who did what?

A. Mr. Barringer had the gun and he was punching my husband in the chest and holding the gun on him. And during this time I was trying to give the money to the other man. I handed the money across the counter.

Q. Where were you getting the money from?

A. The cash register.

Q. And whom were you handing the money to?

A. The other fellow.

Q. Was there any money handed to Mr. Barringer during this?

A. During this time they wanted more money and kept saying --

Q. Who said it?

A. Mr. Barringer. He says, "more money", and my husband pulled out a \$10 and a \$5 and said, "Here, this is all I have". Mr. Barringer took that and put it in his pocket and pulled his coat off and turned around and faced both of us; we were both behind the counter, and stood there with the gun in his hand and I thought that was the end; but he put the gun down in his belt.

Following the testimony of Private Watson and Detective Vaccaro, the prosecution rested.

At the outset of the trial, appellant's attorney made a motion for a continuance in order to obtain the presence of certain witnesses whose identity, with one exception, he claimed were first made known to him by the appellant on the morning of the trial. This motion was denied (Tr. Vol. I, 13). Likewise, at the outset of defendant's case-in-chief, after an abortive attempt to have Mortimer Wheeler, the convicted accomplice in this robbery, testify in his behalf, counsel again requested a delay in order that he might contact certain witnesses whom appellant claimed would corroborate his alibi, i.e., that he was elsewhere at the time the crimes were committed (Tr. Vol. II, 17). Since three of the witnesses that appellant had earlier requested arrived at court early in the afternoon of the second day of trial, the District Court Judge suggested that they be put on the stand to give their testimony under oath (Tr. Vol. II, 28). Counsel for appellant did not object to this procedure and called

Miss Catherine Wells, Francis Wells and David Foote, all of whom testified out of the presence of the jury. Miss Wells and Mr. Foote did not remember whether or not they saw the defendant between 6:00 p.m. and 8:00 p.m. on the evening of February 8th. Mr. Wells, however, stated with some hesitancy that he thought the accused was at his home between 6:00 p.m. and 8:00 p.m. on the night the crime was committed (Tr. Vol. II, 48).

The following day, appellant took the witness stand and testified that he was at the home of Francis Wells early on the evening of February 8 (Tr. Vol. III, 8). Francis Wells was then called as a witness to corroborate appellant's alibi, but, unlike the day before, the witness maintained that he had not seen appellant until between 8:00 p.m. and 10:00 p.m. on the night of the robbery (Tr. Vol. III, 36). Furthermore, Wells testified that he recalled appellant looking out the window during this period. When asked why he had changed his testimony from that of the day before, Wells replied that he had to think of his family (Tr. Vol. III, 39).

After a discussion as to whether the prosecution or defense would be entitled to the benefit of the missing witness rule if none of the alleged corroborating witnesses were produced (Tr. Vol. III, 45, 46), the District Court Judge suggested that the prosecution call some of the witnesses that appellant claimed were at Wells' home between 6:00 p.m. and 8:00 p.m. and who were then present in court at appellant's request to avoid difficulties surrounded with the absent witness rule (Tr. Vol. III, 46). Thereupon, the prosecution called Clarence Eggleston and Henry Eggleston; the former could remember nothing related to the evening

of February 8, 1966 (Tr. Vol. III, 51). Henry Eggleston's testimony, however, proved devastating to appellant (Tr. Vol. III, 59-62). He revealed a conversation that took place between himself and appellant at Wells' house sometime after 9:30 p.m. on the night of the robbery when appellant explained how he escaped (Tr. Vol. III, 60). Henry Eggleston also testified that he recognized the hat found at the scene of the crime as belonging to appellant (Tr. Vol. III, 59).

Following this testimony, both the prosecution and defense indicated that they had nothing further to present.

CONSTITUTIONAL AND STATUTORY PROVISIONS CITED

1. UNITED STATES CONSTITUTION

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

2. STATUTORY PROVISIONS

Title 22, District of Columbia Code, Section 2901

"Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, §810)."

STATEMENT OF POINTS

1. As a result of the lack of pre-trial preparation and the inadequacy of representation during trial on the part of the appellant's court appointed attorney, appellant was deprived of adequate and effective counsel as guaranteed by the Sixth Amendment of the Constitution of the United States.
2. There was insufficient evidence as a matter of law on which the jury could return a verdict of guilty of count two of robbery.
3. The United States District Court for the District of Columbia was without authority, under the facts presented herein, to sentence appellant to consecutive sentences for taking money from both a husband and wife during the course of the same illicit transaction.

SUMMARY OF ARGUMENT

The record furnishes ample proof that the accused was denied effective assistance of counsel both prior to and throughout his trial in the District Court. Lack of pre-trial preparation by counsel not only hindered the accused's establishment of his alibi defense but led directly to the production of prosecution rebuttal witnesses whose testimony later proved highly damaging to the accused. Furthermore, counsel's lack of preparation resulted in incriminating disclosures of statements allegedly made by appellant which would have been otherwise inadmissible. For these and other reasons herein described, it is contended that, viewing the record as a whole, the conclusion that the appellant was denied effective assistance of counsel is inescapable.

Review of the transcript of trial reveals that Robert Richman alone was victimized by the robbery of February 8. Although his wife, Blanche, was present in the market at the time and physically handed the cash register receipts to the appellant's alleged accomplice, this money was at all times previous to the theft in Robert's custody. It was against Robert alone that the robbers applied the force which ultimately led to his relinquishment of the store's assets. Blanche was merely an intermediary, acting at the behest of her husband.

On May 3, 1967, appellant, through his court appointed attorney, moved the United States District Court for the District of Columbia to vacate or correct the sentence imposed upon him by reason of conviction on Count Two of the Indictment. In support of this motion, counsel cited Irby v. United States of America, ___ U.S. App. D.C. ___, 375 F.2d 310 (1967) for the proposition that the trial court cannot impose consecutive

sentences when the crimes were committed during a continuous course of illicit activity. On June 9, 1967, appellant's motion was denied. Irby has since been overruled by this Court sitting en banc on November 17, 1967, but appellant maintains ~~the~~ rationale expressed in Bell v. United States, 349 U.S. 81, rather than Irby, is controlling. Under the circumstances of this case, the only unit of allowable punishment envisioned by §22-2901 of the D. C. Code encompasses thefts of both the fifteen dollars from Mr. Richman and the currency from the cash register. Consecutive punishments imposed for convictions of counts 1 and 2 are beyond the authority of the trial court and therefore, the decision of the District Court must be overruled.

ARGUMENT

1. APPELLANT WAS NOT PROVIDED EFFECTIVE OR ADEQUATE ASSISTANCE OF COUNSEL AT HIS TRIAL BEFORE THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

Concededly, it is much easier to criticize the adequacy of a fellow lawyer's representation of his client before a court of law, having the benefit of hindsight to fortify one's evaluation. In the trial below, however, it is apparent that defendant's court appointed attorney failed to adequately prepare himself to represent his client's interests to the fullest. This lack of preparation manifested itself throughout the trial.

The record discloses that appellant's only asserted defense to the charges against him was that he was elsewhere at the time the crimes were committed. On the first day of trial, appellant's attorney moved for a continuance to allow him to interview certain alibi witnesses, claiming that he had discovered their names only that morning (Tr. Vol. I, p. 3; Vol. II, pp. 16, 23, 24). Later during the trial, appellant took the stand to testify that at the time of the crime, he was at the home of Francis Wells (Tr. Vol. III, p. 8). On cross-examination, appellant identified several people who were at Francis Wells' home at the time he claimed to have been there (Tr. Vol. III, p. 14). Obviously, had counsel expended even the minimum amount of time in preparation for trial, he would have acquired the names of these persons from the appellant and would have interviewed them in advance of trial to determine whether their presence would be required by appellant. As a direct result of this lack of preparation, these alibi witnesses were brought in helter-skelter before the court, which procedure eventually resulted in one of them later proving a

highly damaging prosecution rebuttal witness. (Henry Eggleston, Tr. Vol. III, pp. 55-62) -

Failure to call witnesses where later affidavits of such witnesses conflicted with defendant's trial testimony, has in itself, been held not indicative of ineffective assistance of counsel (Gray v. United States, 299 F.2d 467 (1962)). In this case, however, failure of appellant's attorney to at least interview such witnesses, not only weakened defense's case but led directly to damaging testimony against the accused as well.

This lack of preparation was further manifested in counsel's cross-examination of Detective Vaccaro, during which the witness revealed that appellant had told him that he had thrown the gun away (Tr. Vol. I, p. 121). Such an admission would have been inadmissible during direct examination without proper foundation. Obviously, had appellant's counsel taken the time to interview this witness, he would have known to avoid this area of inquiry. Appellant's counsel also moved for a directed verdict of acquittal because the police originally identified appellant on the basis of tainted evidence (Tr. Vol. I, pp. 110-118; Vol. III, p. 67). The Court denied this motion because appellant's counsel had made no attempt to introduce evidence to support this motion (Tr. Vol. III, pp. 67, 68).

Lack of preparation was again evident in his handling of chief alibi witness, Francis Wells. Even minimum preparation would require this witness to be interviewed extensively prior to trial. Instead, Wells was first interrogated in court under oath without defense objection (Tr. Vol. II, p. 28). (The same is also true of David Foote and Catherine Wells.) When Mr. Wells did testify in open court, his testimony conflicted with that which he had given the day before. Under questioning to determine why

he had changed his story, Wells stated, "I had to think about my family." Certainly this response was indicative that the witness may have been pressured into testifying for the government and if explored, may have eventually led to a mistrial, yet counsel did not pursue the point (Tr. Vol. III, p. 39).

Appellant's counsel failed to introduce any evidence whatsoever in support of his motion for a mental examination (Tr. Vol. I, p. 14); made no effort to obtain discovery of statements of government witnesses under the Jencks Act, 18 U.S.C. §3500, and in fact, helped corroborate the government's case by having appellant stand to enable the complaining witness to verify his height (Tr. Vol. I, p. 56). Additionally, counsel failed to fully explore on cross-examination the possibility of mistaken identity on the part of the Richmans (Tr. Vol. I, pp. 53, 58, 71, 95, 96).

Although examined individually, each of the above deficiencies may not in themselves be indicative of inefficiency to a degree warranting a new trial; cumulatively, however, they reveal representation below the minimum standard required by the Sixth Amendment of the Constitution.

(See, Bryant v. Peyton, 270 F. Supp. 353, 359 (1967); Whitaker v. Warden, 362 F.2d 838 (4th Cir., 1966).

2. THE EVIDENCE PRESENTED CONCERNING COUNT TWO
OF ROBBERY WAS INSUFFICIENT AS A MATTER OF
LAW TO WARRANT A CONVICTION OF THAT CHARGE.

The evidence adduced at trial concerning both counts of robbery consisted exclusively of the testimony of Mr. Robert Richman and his wife, Blanche. According to Mr. Richman's account, appellant and another man entered his store around 6:30 p.m. on the evening of February 8, as he and his wife were closing up. Thereafter, appellant jerked Mr. Richman around, hit him in the chest and on his chin (Tr. Vol. I, p. 46) and "stuck a gun in [his] back and said, 'This is a stickup; give me your money.'" (Tr. Vol. I, p. 45). Richman then told his wife to "Give it to him." and then he himself gave appellant \$15 out of his pocket (id). Appellant called his accomplice and told him to "Take all the change out of the cash register," (Tr. Vol. I, p. 47). Mrs. Richman handed the money across the counter to the second man who then came around behind the counter and took the ~~change~~ out of the register (Tr. Vol. I, p. 48). Both then fled out the door.

Mrs. Richman testified that she and her husband were in the store around 6:15 p.m. or 6:20 p.m. when appellant and another young man came rushing in, grabbed her husband and started pushing him around (Tr. Vol. I, p. 61). Appellant had a gun and pushed her husband around behind the counter and started punching him in the chest, while she was giving the money in the cash register to the other man (Tr. Vol. I, p. 63). Appellant wanted more money and kept saying "more money." Her husband pulled out a \$10 and a \$5 saying, "Here, this is all I have." Appellant took the money, put it in his pocket, faced both her and her husband, put the gun in his belt, turned and fled (Tr. Vol. I, p. 64).

As can be seen from the above accounts, Mrs. Richman's testimony immaterially differs from that of her husband's. She remembers giving the money in the cash register to appellant's accomplice while appellant was beating up her husband, while her husband testified she gave the money to the accomplice in response to his instructions. Under either version, however, the evidence is insufficient to find the appellant guilty of robbery as to Mrs. Richman.

From Mr. Richman's testimony it is clear that prior to the theft, he was the only one assaulted by the two robbers. After being pushed around and assaulted by appellant, Mr. Richman handed over \$15 out of his pocket to appellant and then told his wife to hand over the money in the cash register to appellant's accomplice. Thus, it was not at the direct insistence of either appellant or his accomplice that his wife parted with the funds in the cash register, but that of her husband. When the thugs entered, Mr. Richman was in charge of the store. Both the money in his actual possession, i.e., the \$15 in his pockets and the contents in the cash register were within his control within the meaning of D.C. Code §28-2901. Spencer v. United States, 116 F.2d 801, 73 App. D.C. 98 (1941); Newfield v. United States, 118 F.2d 375, 73 App. D.C. 174, cert. denied 62 S. Ct. 589, 316 U.S. 798, 86 L. Ed. 1199 (1941). It was appellant's pointing his pistol at him and his physical assault that forced Mr. Richman to hand over his pocket money and likewise motivated him to surrender the contents of the cash register. The fact that it was Mr. Richman's wife who served as the intermediary through which the latter funds passed in no way alters the fact that it was the husband from whose control the money was taken in both instances. As stated earlier, the cash register receipts

were primarily in her husband's control, not hers. He was the one exercising dominion over them and it was he that ordered her to surrender them. Certainly, had the thieves personally taken the money from the cash register, they would not have been charged with robbery of thirty-five dollars from Mrs. Richman, but robbery of fifty dollars from Mr. Richman.

The mere fact that the wife was the one who physically transferred the assets of the cash register does not thereby make her the victim. Furthermore, there is no evidence that force was applied to her, or that the money was taken from her by a sudden or stealthy seizure, (United States v. Mann, 119 F. Supp. 406 (1954)), (G.R. Hunt v. United States, 316 F.2d 642, 115 U.S. App. D.C. 1 (1963)), as is required under §22-2901 of the D. C. Code.

Although Mrs. Richman's testimony differs slightly from that of her husband's, the above analysis applies with equal force. Despite Mrs. Richman's claims that she handed over the cash register receipts to the accomplice while appellant was beating up her husband, it is again apparent that these funds were within her husband's control and that it was from his control that they were removed. Again, Mr. Richman was the only one assaulted prior to the theft. The wife seeing her husband physically assaulted, merely acted as any wife would, and handed over the money to prevent further injury to her husband. The fact that testimony showed that she physically passed the money on to appellant's accomplice does not alter the fact that it was the husband who was the actual victim of the robbery.

3. UNDER THE CIRCUMSTANCES OF THIS CASE, THE ALLOWABLE UNIT OF PUNISHMENT ENVISIONED BY §22-2901 OF THE D. C. CODE ENCOMPASSES THEFT OF BOTH THE FIFTEEN DOLLARS FROM MR. RICHMAN AND THE CONTENTS OF THE CASH REGISTER WHICH MRS. RICHMAN HANDED OVER TO THE APPELLANT'S ALLEGED ACCOMPLICE.

Appellant's motion to vacate or correct the sentence imposed upon him as to Count Two of the Indictment, addressed to the District Court, was denied on June 9 of this year. Appellant maintains that this denial was erroneous. In his motion before the District Court, appellant relied on the case of Irby v. United States of America, ___ U.S. App. D.C. ___, 375 F.2d 310, decided March 15, 1967 by a panel of this Court. After rehearing, this court on November 17, 1967, sitting en banc, reversed the panel's decision and affirmed the District Court's ruling. This reversal, however, does not undermine appellant's contention that, under the circumstances of this case, the District Court is without authority to award consecutive sentences for the two counts of robbery. The majority opinion concluded that since in Irby the housebreaking and robbery involved the protection of different interests, the Court could not state with confidence that Congress did not contemplate some additional disincentive for the latter offense, even where the crimes occurred during a continuous course of illicit activity. Therefore, they agreed with the District Court that the degree of doubt discernible on this record does not warrant invocation of the rule of lenity normally applied in cases where substantial doubt as to Congressional intent exists. This holding, however, does not address itself to the facts presented by this record.

The majority opinion in Irby recognized that there are circumstances where it cannot safely be assumed that, simply because the legislature has

defined two separate claims with differing elements and prescribed separate punishments for them, it contemplated that such punishments can be consecutively inflicted." (Citing Ingram v. United States, 122 U.S. App. D.C. 334, 353 F.2d 872 (1965); Davenport v. United States, 122 U.S. App. D.C. 334, 353 F.2d 882 (1965)). "The nature of the two criminal specifications and of the course of conduct in which both crimes may be thought to have been committed, may be such as to raise a doubt as to a legislative purpose to encompass both punishments." Although the Court was referring to instances where two separate pieces of legislation impinge on a course of criminal conduct, these remarks should prove equally applicable to instances where two counts of the same crime are charged as a result of conduct during a continual course of illicit activity. Likewise, the observations of the panel (presumably dicta not overruled) are particularly apropos. Recognizing that the prosecutor and the trial judge [have] almost unfettered discretion to multiply punishment since often it takes nothing more than a fertile imagination to spin several crimes out of a single transaction' (citing Munson v. McClaughry, 198 Fed. 72, 74 (CCA 8th, 1912; Comment, Twice in Jeopardy 75 Yale L.J. 262, 299-321 (1965)), the Court went on to state that, "the cases are perfectly clear that the legality of cumulative punishment depends on more than a finding that separate crimes have been committed." Such language is indicative that this court is acutely attuned to the sentencing problems that exist where multiple crimes of a related nature are perpetrated during the same criminal transaction.

Premised on the above judicial awareness, the appellant specifically relies not on the Irby line of decisions, but on the cases of Bell v.

United States, 349 U.S. 81 and United States v. University C.I.T. Credit Corp., 344 U.S. 218. Both these cases deal with the allowable unit of prosecution under a given statute, as opposed to punishments authorized by separate and distinct legislative enactments. In the former case, the defendant pleaded guilty to two counts of violations of the Mann Act, for transporting two women across state lines on the same trip and in the same vehicle. In rejecting the argument that the statute in question made the simultaneous transportation of more than one woman liable to cumulative punishment for each woman so transported, the court concluded that "when Congress leaves to the Judiciary the task of imputing to Congress as undeclared will," as the court found it has done here, "the ambiguity should be resolved in favor of "lenity" (349 U.S. at 83). The same result was reached in Universal C.I.T. Credit Corp. where the court found the statute also failed to provide an explicit answer on this point.

§22-2901 of the D. C. Code reads:

"Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, §810)."

Nothing in the wording of this statute, nor in its legislative history indicates whether cumulative punishment was intended under the facts presented by this record. Certainly, the practically simultaneous robbery from a husband and wife of property belonging to both of them, committed during the course of the same illicit transaction presents a factual situation not conceptually different from that presented in Bell under the Mann Act. In each instance, the crux of the prescribed conduct entails one

criminal objective executed during the course of a continuous illicit transaction. Were this Court to now hold consecutive punishments valid in situations like the present, it would certainly be spinning several crimes out of a single transaction in contravention of the rationale expressed in both Irby decisions and would be thwarting the principles enunciated in Bell and Universal C.I.T. Such a result would be even more invidious under the factual context of this case, where one of the victims, Mrs. Richman, was acting as agent for her husband. (See, Argument 2.)

Furthermore, the recommendations contained in the Amicus Curiae brief in Irby, though expressly termed inapplicable to the court's decision, support the appellant's position with respect to consecutive sentences. The Amicus advocated "a supervisory rule to the effect that consecutive sentences may not be imposed for offenses arising out of a single course of conduct unless the sentencing judge (1) finds from the facts that the defendant was not motivated by a single intent and objective, and (2) recites his reasons for believing that consecutive sentences are necessary to achieve at least one of the recognized sentencing goals."

It is obvious from the record that the robbers were motivated by the single objective of robbing the Somerset Market and that this intention included the taking of money or other valuables from the proprietors of that organization, regardless of who or how numerous they might be. The testimony clearly establishes that the two men who entered the grocery store on the night of February 8 fully intended to rob the store owners of the day's receipts. The lights were still on and the figures of Mr. and Mrs. Richman must have been visible from the outside. The robbers must have known that the owner or his employees were in the store. They must

have considered that a subsequent entry in an attempt to steal might result in their having to forcibly take money from the owner or his employees. This is not a case where the would-be-thieves entered a darkened and supposedly vacant building, only to discover subsequently that it was occupied and consequently were forced to flee or commit a robbery, as opposed to a simple larceny. In other words, this is not an Irby situation "where a man commits a crime with intent, and then expands or modifies his purpose and invades another interest." (See Judge Leventhal's concurring opinion in Irby v. United States, case no. 19,983 decided November 17, 1967). The thieves in this case quite obviously intended to forcibly steal the day's grocery receipts from whomever might be in charge of the store, irrespective of whether that might be one or more persons. Therefore, were this court to follow the recommendations of the Amicus in the instant case, the District Court should not have imposed consecutive sentences for the two counts of alleged robbery since the appellant was motivated by the same incentive in both crimes and in each instance his intent was identical.

In enacting §22-2901 of the D. C. Code, Congress was silent regarding any intention of creating consecutive sentences for punishing violations occurring under the circumstances herein presented. Normally where there is substantial doubt as to whether Congress intended to provide consecutive penalties, the courts have employed the "rule of lenity", limiting the punishment to that authorized by the more serious crime. In Irby, however, the majority found separate interests which Congress presumably sought to protect in legislating against the crimes of housebreaking and robbery, and this provided sufficient indication of Congressional intent so as to avoid recourse to the lenity rule. Even under the Irby circumstances, Congress was found to have intended separate punishments since

"his [Irby's] invasion of the premises to steal does not irrevocably commit him to rob from the person of anyone he finds there." As has been previously pointed out, however, the two men who entered the premises of the Somerset Market, Inc. were irrevocably committed to rob from the person of anyone they found there. Consequently this basis for divining Congressional intent is not present, as it was in Irby and since there is nothing in the wording of the statute nor in its legislative history that devulges intent of Congress under the circumstances of this case, the following reasoning, employed in Bell, dictates resort to the rule of lenity:

"It is not to be denied that argumentative skill, as was shown at the Bar, could persuasively and not unreasonably reach either of the conflicting constructions. About only one aspect of the problem can one be dogmatic. When Congress has the will it has no difficulty in expressing it -- when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment. This in no wise implies that language used in criminal statutes should not be read with the saving grace of common sense with which other enactments, not cast in technical language, are to be read. Nor does it assume that offenders against the law carefully read the penal code before they embark on crime. It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses, when we have no more to go on than the present case furnishes." Bell v. United States, 349 U.S. 81, 83, 84 (1955).

CONCLUSION

The conviction of appellant should be reversed and a new trial ordered because the appellant lacked effective assistance of counsel before and during his trial in the United States District Court for the District of Columbia. The ruling of the United States District Court for the District of Columbia denying appellant's motion to vacate or correct the sentence imposed for conviction of Count Two should be overruled because evidence of only one robbery was produced at trial and because Congress never intended that consecutive punishments be imposed upon the circumstances of this case.

Respectfully submitted,



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BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,020

JOHN L. BARRINGER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 29 1968

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Cr. No. 509-66

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

I

Is the heavy burden of a claim of ineffective assistance of counsel established on this record?

II

Was appellant properly convicted of robbing Mrs. Rickman when the evidence shows that property was taken from within an area subject to her control while she was in a state of fear induced by appellant?

III

Was appellant properly sentenced consecutively for the contemporaneous robberies of two persons when he violated the protected interest which each victim had in the security of his person?

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*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,020

JOHN L. BARRINGER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On April 25, 1966, an eight-count indictment was filed in the District Court charging appellant and Mortimer R. Wheeler with two counts of robbery¹ (22 D.C. Code

¹ FIRST COUNT:

On or about February 8, 1966, within the District of Columbia, John L. Barringer and Mortimer R. Wheeler, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Robert L. Rickman, property of Somerset Market, Inc., a body corporate, of the value of about \$15.00, consisting of \$15.00 in money.

SECOND COUNT:

On or about February 8, 1966, within the District of Columbia, John L. Barringer and Mortimer R. Wheeler, by force and violence

§ 2901), two counts of assault with a dangerous weapon² (22 D.C. Code § 502), assault on a police officer with a dangerous weapon (22 D.C. Code § 505(b)), and assault with intent to kill (22 D.C. Code § 501), and appellant alone with destroying property (felony) (22 D.C. Code § 408) and carrying a pistol without a license (22 D.C. Code § 3204). After a trial before Judge Walsh on January 3-5, 1967, the jury found appellant guilty as charged in the indictment. At an earlier date Wheeler had pled guilty to two counts of the indictment. On April 21, 1967, appellant was sentenced to consecutive terms of imprisonment for the following offenses: for the robbery of Robert L. Rickman, three to nine years; for the robbery of Blanche E. Rickman, three to nine years; for assault with intent to kill, five to fifteen years; for destroying property, one to three years—a total sentence of twelve to thirty-six years. Concurrent terms were imposed for the other counts of the indictment.³

At trial Robert L. Rickman, the owner of the Somerset Market, a body corporate, located at 1501 S Street, Northwest, testified first for the Government. At about 6:20 p.m. on February 8, 1966, he was filling the soft drink cooler with his back to the door as a preparation to closing the market when he felt a gun at his back, was "jerked" around and struck on the face and chin (Tr. I

and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Blanche E. Rickman, property of Somerset Market, Inc., a body corporate, of the value of about \$35.00, consisting of \$35.00 in money.

² THIRD COUNT:

On or about February 8, 1966, within the District of Columbia, John L. Barringer and Mortimer R. Wheeler made an assault on Robert L. Rickman with a dangerous weapon, that is, a pistol.

FOURTH COUNT:

On or about February 8, 1966, within the District of Columbia, John L. Barringer and Mortimer R. Wheeler made an assault on Blanche E. Rickman with a dangerous weapon, that is, a pistol.

³A three to nine year term for assaulting Robert L. Rickman with a dangerous weapon was to run concurrently with the sentence for robbing him, and a like three to nine year term for assaulting Blanche E. Rickman with such a weapon was to run concurrently with the consecutive sentence for robbing her.

43-46).⁴ When turned around he was facing a man armed with a pistol whom he positively identified in court as appellant (Tr. I 45-46, 49-50). A second man wearing a stocking over his head to conceal identity was also present in the store (Tr. I 45-47). Appellant announced, "This is a stick-up; give me your money," and the witness continued:

I was close to the cash register and I told my wife, I said, "Give it to him." He [appellant] said, "Well give me the money you have in your pockets," so I gave him \$15.00 out of my pockets (Tr. I 45).

Mrs. Rickman removed some 19 one dollar bills from the register and handed them across the counter to the second man (Tr. I 48). Pushing Rickman around behind the counter appellant conducted a search for more money and told his accomplice to take all the change from the cash register. The second man came around behind the counter from the opposite side and took the change as directed. (Tr. I 47-48). The appellant paused at the door to place the long-barrelled gun into his belt (Tr. I 49). The two then made their getaway running westerly along S Street towards 16th Street (Tr. I 49, 51, 53). Rickman had full opportunity to observe appellant's face at close range during the robbery (Tr. I 50) and stated that he wore a large pair of glasses, light trenchcoat and dark cap and had upper teeth missing (Tr. I 48, 49, 52).

Mrs. Blanche E. Rickman testified that around 6:20 p.m. that night her husband, Robert, was filling the soft drink cooler and she was behind the counter when two men came rushing in. One, positively identified by her as appellant, had a gun which he held on her husband while punching him in the chest. (Tr. I 62-63). The second man, wearing a stocking over his head, "put his hand across the counter" and demanded from her the contents of the cash register (Tr. I 61). She took money out of the register and placed it in a hat passed across the

⁴ Volumes I, II and III of the trial transcript will be referred to herein as Tr. I, Tr. II and Tr. III respectively.

counter by the second man for that purpose (Tr. I 63-64, 71). In the meantime appellant took \$15.00 from Rickman and pushed him around behind the counter (Tr. I 64, 68). After completing the robbery appellant paused briefly at the door facing the Rickmans and placed the gun in his belt (Tr. I 64). The two men then fled westerly on S Street towards 16th Street. She ran out the door following them, observed Officer Watson and screamed to him, "they just held us up and here they go." She and Watson ran in pursuit of the two, and contact was never lost. (Tr. I 65). While appellant was inside the store she also had full opportunity to observe his face⁵ and appearance from close range (Tr. I 68-69). She said he wore a light trenchcoat, a cap and a pair of large glasses and also had an upper tooth missing (Tr. I 61-62, 66).

Police Officer Walter A. Watson, Canine Corps, testified that he was on duty with his dog, King 15, at the northeast corner of 15th and S Streets, Northwest, at approximately 6:30 p.m. February 8, 1966. At that time he observed two Negro males run out of the Somerset Market located on the northwest corner. (Tr. I 78-80). Mrs. Rickman informed him of the robbery and pointed at the two fleeing men. Watson gave chase with his dog. In the middle of the 1500 block of S Street the fleeing men turned south into an alley. When they did not halt as ordered to by Watson, he turned King 15 loose. After running three-quarters of a block in the alley the two men turned left and ran to behind the front of a 1963 Chevrolet parked in the rear of 1726 15th Street. (Tr. I 80). Watson never lost sight of them (Tr. I 93). King 15 grabbed one of the men by the arm, and the other, appellant, fired two shots at the dog, hitting him. Appellant then turned, faced Watson, who was by this time a few feet away at the rear of the Chevrolet, and fired two shots at him. (Tr. I 80-82, 85-86). When appellant faced the officer to fire the shots, Watson saw his face

⁵ "I kept my eyes on his face for identification" (Tr. I 69).

under favorable lighting conditions at a distance of one car length, and his courtroom identification of appellant was a positive one (Tr. I 81-82, 86-88). Wounded superficially by one of the shots, Watson fell to the ground, drew his service revolver and proceeded towards the front of the car in time to see one of the suspects going over a nearby fence. Finally, he spotted a person behind the fence and ordered him out. Hearing what he thought to be the click of a gun hammer, the officer fired his revolver. He then found Mortimer Wheeler behind the fence wounded. (Tr. I 80-81, 87). Appellant was wearing dark pants and a long, light trenchcoat. King 15 died that evening. (Tr. I 88, 96).

Detective Sergeant Norbert Vaccaro of the Robbery Squad was the final witness in the Government's case-in-chief. Arriving in the rear of 1726 15th Street around 6:40 p.m., February 8, 1966, he saw Officer Watson and Wheeler, both wounded. Under a parked automobile he found a hat containing \$11 in bills, \$4.67 in change and a lady's silk stocking. The money and stocking were identified by Vaccaro and admitted into evidence. (Tr. I 104, 106-110, 125). Vaccaro arrested appellant on a warrant at 1526 V Street, Southeast, on February 11, 1966 (Tr. I 112-113).⁶ Cross-examined about the pistol used in the robbery he testified that appellant admitted throwing it away (Tr. I 121).⁷

Before the jury below appellant attempted to establish an alibi defense through his own testimony and that of Francis Wells. Appellant testified that around four p.m. on February 8, 1966, he left his parents' home at 1333 8th Street, Northwest, where he was living at the time, and walked to 9th and R Streets, Northwest, where he met Mortimer Wheeler (Tr. III 7-8). He and Wheeler

⁶ Wheeler apparently told the police on the way to the hospital after being wounded that appellant was the other robber (Tr. I 113). This statement was not offered.

⁷ The prosecutor proffered that appellant admitted to the robbery and to shooting Officer Watson but did not seek to have appellant's statements admitted into evidence (Tr. II 27).

then went to where the latter was living, a house at 1506 S Street, Northwest, across the street from the Somerset Market, so that Wheeler could return a jacket previously borrowed from appellant. They stayed there watching television until about 5:50 p.m. Appellant then left Wheeler on the corner of 15th and S and went directly to the home of Francis Wells at 1708 9th Street, Northwest, arriving a few minutes after six p.m. (Tr. III 8, 12-13, 15). He stayed until around 8:30 p.m. Other people were there. (Tr. III 13-14). When he was arrested the police did ask him about a revolver, but he did not say he had one or threw one away (Tr. III 10). Being sick of living off his parents he went to stay at the home of a friend of his, Clarence Martin, at the V Street, Southeast, address later in the evening of February 8, 1966 (Tr. III 10-11, 15). His parents were not told of this move in advance but he did phone them between February 8 and 11 to say that he was alright. He did not tell them where he was. (Tr. III 20-21). Appellant had owned a trenchcoat as described by the witnesses but threw it away prior to February 8 (Tr. III 22). Also he did have a false tooth removable from the upper portion of his mouth (Tr. III 17-18).

Francis Wells' testimony was that appellant had not arrived at his home until between eight and ten p.m. that night (Tr. III 36). Appellant stayed until after midnight and kept looking out the window (Tr. III 41-42). The witness admitted testifying previously out of the presence of the jury that appellant was present at his house between six and eight that evening. He charged his testimony, he said, because he had to think of his family (Tr. III 39).

In rebuttal the Government first called Clarence Eggleston, who appellant had said was present with him at the Wells home the night of February 8 (Tr. III 14). The witness had no memory of that evening (Tr. III 51-54). The second and final rebuttal witness was Henry Eggleston, a friend of appellant's for 12 years (Tr. III 56). He arrived at Francis Wells' home at 9:30 or 9:45

that evening. Appellant was there. Henry had already heard about the robbery and knew that Wheeler had been shot and another person had gotten away. At Wells' home appellant told Henry about the robbery and explained how he was able to get away. (Tr. III 57-61).

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 2901 provides:

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

SUMMARY OF ARGUMENT

I

On this record appellant cannot sustain the heavy burden he must shoulder to establish that actions of his counsel below deprived him of a fair trial. The record does not support his principal claims that the damaging testimony of Francis Wells, Henry Eggleston and Detective Vaccaro was causally related to inadequate preparation for trial. Other alleged deficiencies of counsel do not amount to ineffective assistance of counsel. The record as a whole shows a continuing and capable effort by a defense counsel up against a Government case of overwhelming strength.

II

The conduct of appellant and his accomplice, Wheeler, was designed to and did put both Mr. and Mrs. Rickman in fear. While in fear Mrs. Rickman surrendered the bills in the cash register to Wheeler and permitted him to remove the change therefrom. Wheeler was aided and abetted by appellant when he took the bills and was acting

under appellant's orders when he took the change. The contents of the register were within an area subject to Mrs. Rickman's control, and she did actually exercise control over them. Appellant was therefore properly convicted of robbing her.

III

Robbery is an offense against the security of the person. The robbery of each person is a separate and distinct offense under 22 D.C. Code § 2901. Since the robbery of two persons causes twice the social harm sought to be protected against as the robbery of a single individual, there should be little doubt that Congress intended the permissibility of a double penalty to correspond with a double harm. Appellant was therefore properly sentenced consecutively for robbing Mrs. Rickman.

ARGUMENT

I. Appellant was not denied effective assistance of counsel.

{ Tr. I 3-4, 6-8, 12-13, 19, 22, 32-33, 44, 53-59, 71-73, 96, 110-118, 120-121; Tr. II 5-8, 10, 16-18, 24-26, 28, 31-34, 41, 45, 47-48, 51, 62-63, 79-80, 92; Tr. III 24-25, 38, 46-47

Appellant's principal contention here is that he was afforded ineffective assistance of counsel by his court-appointed attorney at trial. The burden on appellant to establish such a claim is heavy and "[t]he question here is whether his representation was so ineffective that [a]ppellant was denied a fair trial." *Harried v. United States*, D.C. Cir. No. 20,327, decided November 30, 1967, slip op. p. 6. See *Bruce v. United States*, — U.S. App. D.C. —, 379 F.2d 113 (1967); *Dyer v. United States*, — U.S. App. D.C. —, 379 F.2d 89 (1967); *Mitchell v. United States*, 104 U.S. App. D.C. 57, 259 F.2d 787,⁸

⁸ "We think the term 'effective assistance'—the court's construction of the constitutional requirement for the assistance of counsel—does not relate to the quality of the service rendered by a trial

cert. denied, 358 U.S. 850 (1958); *Edwards v. United States*, 103 U.S. App. D.C. 152, 256 F.2d 707, *cert. denied*, 358 U.S. 847 (1958); *Jones v. Huff*, 80 U.S. App. D.C. 254, 152 F.2d 14 (1945). The entire record must be examined in assessing a claim of ineffective assistance (*Harried v. United States, supra*, p. 6), and one relevant factor should be the strength of the Government's case against the accused. *Cf. Dyer v. United States, supra*, 379 F.2d at 89.

Appellant argues that trial counsel should have contacted and interviewed defense witnesses prior to the trial and that if this had been done, the defense would have been spared the embarrassment of the damaging testimony of Francis Wells and Henry Eggleston.

Relevant to that contention the record shows the following: counsel at trial, I. Irwin Bolotin, was appointed on April 28, 1966. The first trial of the case, with appellant and Wheeler as co-defendants, began on September 27, 1966. A mistrial was declared on September 29, 1966, after appellant failed to appear for the second day of trial on September 28. Prior to the first trial Mr. Bolotin had made three separate bond motions in behalf of appellant. Counsel succeeded in getting personal bond for his client on September 23, 1966. A bench warrant was issued on September 28 and returned executed on November 7, 1966. (Docket entries for April 28, September 23, 27-29 and November 7, 1966). On January 3, 1967, before trial began, counsel moved for a continuance for the purpose of locating alibi witnesses. Counsel had learned of these witnesses some months before and had tried to locate them without success. The continuance was denied. (Tr. I 3-4, 13). The Government's case-in-chief was presented on January 3. The following morning, before resumption of

lawyer or to the decisions he makes in the normal course of a criminal case; except that, if his conduct is so incompetent as to deprive his client of a trial in any real sense—render the trial a mockery and a farce is one descriptive expression,—the accused must have another trial; or rather, more accurately is still entitled to a trial.” 104 U.S. App. D.C. at 63, 259 F.2d at 793.

the trial, Mr. Bolotin said that he had by then spoken to every person named "at the hearing,"⁹ that none of those persons, three of whom were Lillian and Pete Green and David Foote, could give testimony helpful to appellant, that appellant's alibi at the time of the preliminary hearing was that he was present at a UPO meeting at the time of the offense and that Foote was unable to find appellant's name on the list of those attending the meeting. Appellant himself then offered the explanation that he had had the days mixed up and that the UPO meeting was not on the day of the offense. (Tr. II 6-8). Mr. Bolotin also related that the day before, for the first time appellant had given him the name and address of a young lady who could alibi him for the right day and who knew of additional witnesses as well.¹⁰ Counsel asked for a brief recess to continue efforts begun the day before to locate her. Appellant had given him a wrong address. (Tr. II 5-6, 10). The court then apparently recessed for some period. After the recess, Mr. Bolotin said that appellant had given him the names of five possible alibi witnesses. These names were proffered to counsel for the first time that very morning. Counsel had either gotten a subpoena for or had contacted the employer of each prospective witness. (Tr. II 10, 16, 28). The court then recessed for lunch. At 2:00 p.m. Mr. Bolotin stated that two of the five witnesses, Catherine Wells and Clarence Eggleston, were present, had been interviewed by him and had no recollection of seeing appellant on February 8, 1966. In addition he had talked on the telephone to a third, Mona Eggleston, who could not give helpful testimony either. (Tr. II 16-17, 24). A forthwith subpoena was issued for a fourth witness, David Foote, and the court again apparently recessed (Tr. II 18). Following this recess Mr.

⁹ Mr. Bolotin was apparently referring to the preliminary hearing before the U. S. Commissioner.

¹⁰ Appellant apparently had learned that this young lady and the witness she could suggest would be able to give helpful testimony from Wheeler after appellant was returned to jail on November 7, 1966 (Tr. I 6-7).

Bolotin informed the court that he had interviewed David Foote then present in the courtroom and that Foote had no recollection of seeing appellant on February 8, 1966 (Tr. II 20). That left only the fifth witness, Francis Wells, still unaccounted for. Mr. Bolotin asked the court to give him until the next day to produce this man. For two hours counsel attempted to locate this witness on the phone. (Tr. II 24-26). Judge Walsh then suggested that the witnesses who were present and had been interviewed by defense counsel should be questioned on the stand out of the presence of the jury. Pursuant to this procedure, Catherine Wells testified that if she had seen appellant at the Francis Wells home on the night in question, it would have been after eight o'clock (Tr. II 31-34, 41). Apparently while Miss Wells was on the stand Francis Wells came into the courtroom. After her testimony he was put on the stand out of the presence of the jury (Tr. 45). He stated that appellant "could have been" at his home at 1708 9th Street, Northwest, between six and eight p.m. on February 8, 1966 (Tr. II 47-48). On cross-examination the witness was not positive that he saw appellant on that date. Nor, if he had seen him, could he say with certainty what time it was that evening. (Tr. II 51, 62-63). David Foote, placed on the stand, had no memory of the events of February 8, 1966 (Tr. II 79-80). Prior to adjournment the court directed all the witnesses present to return to court the following day (Tr. II 92). Henry Eggleston was not one of the five witnesses mentioned by appellant to counsel on January 4 and apparently was not in court on that day. The record does not show that his presence in court on January 5 was at defense request or was other than fortuitous.¹¹

¹¹ On January 5, following the testimony of appellant and Francis Wells before the jury, Mr. Bolotin repeated at the bench that appellant had given him the names of *five* possible witnesses the day before. In naming the five he, inadvertently in our view of the record, mentioned a *sixth* person, Henry Eggleston, as well as the five discussed on the previous day, David Foote, Catherine Wells, Francis Wells, Mona Eggleston and Clarence Eggleston. If the mention of

The record contains no basis for supposing that Mr. Bolotin did not make adequate preparation for trial. The defense planned was alibi. Counsel was eventually able to contact the witnesses appellant thought would establish an alibi at the UPO meeting only to find that none could be helpful. For the first time at his second trial appellant communicated to counsel a new alibi defense and the names of five witnesses to establish it. The record is devoid of indication that counsel could have secured those names prior to trial.¹² Under adverse circumstances Mr. Bolotin was able to contact and interview four of these witnesses, Catherine Wells, Clarence Eggleston, Mona Eggleston and David Foote. They could not give helpful testimony and were not called before the jury. And while counsel's interview with Francis Wells which appears of record was under unusual conditions, we do not see prejudice to appellant. Having the witness's story related under oath was, if anything, some guarantee he would stick to it the next day before the jury.¹³ The thrust of appellant's complaint here regarding Wells is that counsel did not interview him prior to his jury testimony. Manifestly he was interviewed on the stand, and there is nothing in the record to show that Mr. Bolotin did not talk to him in private after court adjournment on January 4. The tactical decision to call Wells before the jury the next

Henry Eggleston was not inadvertent, then he was present on January 4, was interviewed by defense counsel that day, and the decision was made then not to call him as a defense witness. (Tr. III 46-47).

¹² The actual frequency and extent of pre-trial consultation between attorney and client is not a matter of record, and certainly no inference favorable to appellant's contentions here can be drawn. Of note perhaps is that appellant never spoke personally to Francis Wells after February 8, 1966 (Tr. III 24-25) although he was on personal bond from September 23 to November 7, 1966.

¹³ There was an additional advantage in that counsel learned from the prosecutor's cross-examination that Wells had made a prior statement to the police that appellant had come to the Wells home late the night of the robbery and had spent the night looking out the window (Tr. II 51-52).

day is easy to criticize with the benefit of hindsight. Counsel was facing a Government case of overwhelming strength. To have combatted it with appellant's uncorroborated alibi testimony alone would have offered a slim hope for acquittal indeed.

On the record Henry Eggleston's damaging testimony is not the fault of defense counsel on even a speculative lack of preparation theory. He was not wanted by appellant as an alibi witness. Counsel did not seek his presence in court. That he was there on January 5 had no connection with the care used in preparing the defense.¹⁴

Appellant's argument about the damaging testimony suffers from a more fundamental defect though. It would seem clear that this testimony by two friends of appellant was truthful.¹⁵ It was at least admissible. And we do not conceive that appellant was deprived of a fair trial because defense counsel failed to keep away from the jury truthful or admissible testimony.

Appellant says that the damaging testimony elicited in the cross-examination of Detective Vaccaro about appellant throwing the gun away was the result of counsel's failure to interview the witness. That testimony followed a line of defense inquiry which established that there was no gun on appellant or in the apartment of 1526 V Street, Southeast, at the time of arrest and that appellant did not resist arrest (Tr. I 120-121). Counsel may or may not have interviewed Vaccaro. He may have requested an in-

¹⁴ See, however, *supra*, fn. 11. If Henry Eggleston was present on January 4 at defense behest, counsel decided not to call him as a defense witness that day after interviewing him. His presence in court the following day was therefore the result of Judge Walsh's order that all witnesses present at adjournment on January 4 return the next day. On no theory is counsel responsible for his testimony.

¹⁵ Appellant's speculation that Wells may have been pressured into testifying for the Government is, in our view, without basis in the record. Appellant's Br. 14-15. Defense counsel in fact asked the witness whether anyone had induced a change in his testimony and received the reply, "Well, I did myself—" (Tr. III 38).

interview and been refused one.¹⁶ The record is silent on these possibilities. And in any event a failure to interview prosecution witnesses prior to trial does not amount to ineffective assistance of counsel. *Frost v. United States*, 111 U.S. App. D.C. 414, 298 F.2d 328, *cert. denied*, 370 U.S. 946 (1962). Moreover, counsel may have considered the damaging inquiry a safe one based on interviews with his client—appellant testified at trial that at the time of arrest he did not say that he had a revolver or threw it away (Tr. III 10).

Appellant faults counsel for not pressing the motion for judgment of acquittal on the ground that the police first learned of appellant's involvement from Wheeler after the latter's arrest (Tr. I 110-118). Appellant manifestly had no standing to challenge statements of Wheeler not directly admitted against him and the fruits thereof because no rights accruing to appellant were violated. *Wong Sun v. United States*, 371 U.S. 471, 491-492 (1963). *Long v. United States*, 124 U.S. App. D.C. 14, 17-18, 360 F.2d 829, 832-833 (1966). Moreover, assuming standing, the testimony and identifications of the witnesses at trial would not be excludible on a theory that they were the fruit of an unlawful statement by Wheeler. *Brown v. United States*, — U.S. App. D.C. —, 375 F.2d 310, 313-315 (1966), *cert. denied*, 87 S. Ct. 2133 (1967). Since the motion was without merit, the failure to press it was not ineffective assistance of counsel.

Other alleged deficiencies of trial counsel are set forth at Appellant's Br. 15. A likely reason why counsel did not introduce evidence to support the motion for mental examination was that there was none available.¹⁷ Whether

¹⁶ We do not read *Gregory v. United States*, 125 U.S. App. D.C. 140, 369 F.2d 185 (1966), to mean that witnesses may not refuse to be interviewed by defense counsel. They may not be advised to do so by the prosecutor, however.

¹⁷ There was a post-trial commitment of appellant to Saint Elizabeths Hospital to determine competency to be sentenced. At the competency hearing on April 21, 1967, it was the opinion of Dr. William Schwartz, a psychiatrist at Saint Elizabeths, that appellant was without mental disease and competent to cooperate with counsel.

counsel had received from the prosecutor the statements to which he was entitled under the Jencks Act is not directly disclosed by the record. However, counsel did ask Rickman on cross-examination whether he had originally described his assailant to the police as being six feet tall and 180 pounds (Tr. I 55), some record indication counsel had secured Jencks statements. Of course, whether to attempt to impeach a witness with a Jencks statement is a matter of trial tactics dependent upon the content of the statement compared with the direct testimony of the witness, and a failure to do so is not ineffective assistance of counsel. See *Williams v. United States*, 108 U.S. App. D.C. 384, 282 F.2d 867 (1960), *cert. denied*, 365 U.S. 836 (1961). Mr. Bolotin's purpose in asking appellant to stand during the cross-examination of Rickman was to show that appellant was not six feet tall and 180 pounds as the witness had previously described him.¹⁸ As such the tactic was effective impeachment. Finally, counsel's cross-examination of the Rickmans did explore the circumstances underlying their identification (Tr. I 53-59, 71-73). More extensive cross-examination might have further emphasized the positive identifications they made. The factors indicative of whether more or less cross-examination is the better course do not appear of record on appeal, and for that reason even no cross-examination of an adverse witness cannot be characterized ineffective assistance of counsel. *Carter v. United States*, 108 U.S. App. D.C. 225, 281 F.2d 58 (1960). *Slaughter v. United States*, 89 A.2d 646, 647-648 (D.C. Ct. App. 1952).

The record as a whole shows a continuous and capable effort by counsel to protect the rights of appellant. Before trial counsel filed and argued three separate bond motions and ultimately was able to get appellant released on per-

and to understand the proceedings at the time of sentencing (Tr. of that hearing 6). Thus there is basis in the record for supposing counsel had no evidence to support a motion for mental examination.

¹⁸ When appellant stood up the witness estimated his height at "around 5'11" (Tr. I 56). Officer Watson, asked to describe appellant during the chase from the Somerset Market, said he was "approximately 5'9" or 5'10" and "150 to 160 pounds" (Tr. I 96).

sonal bond on September 23, 1966.¹⁹ Counsel also filed and argued a motion to dismiss the indictment and to suppress evidence (Docket entries for May 26 and June 3, 1966). After sentence he filed and argued a motion to correct or vacate the consecutive sentence imposed for the robbery of Mrs. Rickman (Docket entries for May 3 and June 9, 1967). He advised and aided appellant in the filing of an appeal (letter from appellant to Chief Judge Curran dated April 29, 1967). During trial he was careful to keep out of the testimony (1) any reference to other cases pending against appellant (Tr. I 5), (2) any reference to Wheeler's plea of guilty to two counts of the indictment (Tr. I 8) and (3) all confessions or admissions by either appellant or Wheeler (Tr. I 12, 110). He asked the jury panel whether anybody had heard of appellant from any publicity and successfully struck for cause juror Hawthorne who had read about appellant in the newspaper (Tr. I 19, 22). He exercised three peremptory challenges (Tr. I 32-33). He objected to Rickman's characterization of the events inside the Somerset Market as a "holdup" before a foundation had been laid (Tr. I 44). When the prosecutor approached the bench to seek permission to ask appellant to demonstrate his removable tooth, counsel raised the objection of self-incrimination and sought to distinguish *Schmerber v. California*, 384 U.S. 757 (1966), on the ground that here appellant was to be required to perform a demonstration in the courtroom.

Finally, in assessing whether actions of counsel deprived appellant of a fair trial, we urge that the Government's case was of overwhelming strength. Compare *Dyer v. United States*, *supra*. Three witnesses with favorable opportunities to observe positively identified appellant at trial. His own testimony²⁰ could hardly have been taken seriously

¹⁹ The motions were filed on May 16, August 4 and September 16, 1966, and were argued on June 3, August 18 and September 23, 1966 (Docket entries for those days).

²⁰ Part of that testimony was that he was with the other robber, Wheeler, that afternoon at 1506 S Street, Northwest, left him at

by the jury. The record shows that no person could alibi appellant for the time of the offense. The ablest counsel could not have changed the result reached by the jury.

II. There was sufficient evidence for the jury to convict appellant of robbing Mrs. Rickman.

(Tr. I 43-48, 52, 61-64, 68, 71)

Appellant argues (1) that the evidence was insufficient to convict him of robbing Mrs. Rickman and (2) that, if that conviction is valid, it was error to sentence him consecutively on the two robbery counts of the indictment.²¹

The evidence is that appellant and Wheeler entered the market together. Appellant pointed a pistol at Rickman, manhandled him and demanded money. Mrs. Rickman took the bills out of the register and handed them to Wheeler. Appellant relieved Rickman of \$15.00, looked behind the counter for more money and told Wheeler to take the change from the register, which Wheeler did. Rickman said that after the initial assault and demand for money by appellant he told his wife to surrender the contents of the register. Mrs. Rickman did not mention hearing such a statement by her husband and stated that Wheeler asked for the register money. In determining whether the conviction can be sustained the evidence is of course viewed in a light favorable to the Government. See *Crawford v. United States*, — U.S. App. D.C. —, 375 F.2d 332, 334 (1967). While actual "force or violence" was perhaps only directed towards Rickman, we think that the conduct of the robbers, especially that of appellant, was designed to and did put both Mr. and Mrs.

the corner of 15th and S at 5:50 p.m., one-half hour before the robbery, and just happened to move away from home to 1526 V Street, Southeast, the very night of the robbery.

²¹ We note that appellant does not here attack the propriety of the three to nine year sentence for assaulting Mrs. Rickman with a dangerous weapon. Since that sentence runs at the same time as that for robbing her, this Court need not consider appellant's above contentions. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

Rickman in fear. 22 D.C. Code § 2901.²² The state of fear lasted at least until the robbers left the store. And Wheeler was aided and abetted by appellant when he took the bills from Mrs. Rickman and was acting under appellant's order when he removed the change from the register. The only remaining question is whether the contents of the register, bills and change, were in Mrs. Rickman's "immediate actual possession."²³ That term includes "at least an area within which the victim could reasonably be expected to exercise some physical control over" the property. *Spencer v. United States*, 73 U.S. App. D.C. 98, 99, 116 F.2d 801, 802 (1940). Mrs. Rickman not only could exercise physical control over the money but did exercise such control by her act of handing it to Wheeler. Rickman's testimony that he told his wife to surrender the money in the register indicates that the register was closer to her than to him and more in her custody than in his at the time of the robbery. In fact both were clearly able to exercise custody and control anywhere in this store which only measure 30 by 40 feet (Tr. I 52). There is no factual basis in the record for appellant's assertions that Rickman alone was in charge of the store and he alone had control over the register receipts. Appellant's Br. 17. In summary, the evidence establishes that Mrs. Rickman was intentionally put in fear by appellant and Wheeler and as a consequence thereof surrendered money which was within an area subject to her physical control. Appellant was properly convicted of robbing her.²⁴

²² "Whoever, by force or violence, . . . or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery . . ." (Emphasis supplied).

²³ Bare custody or control gives one possession within the ambit of the robbery statute. Ownership is not necessary. *Neufield v. United States*, 173 U.S. App. D.C. 174, 187, 118 F.2d 375, 388 (1941), cert. denied, 315 U.S. 798 (1942).

²⁴ Appellant argues that Mrs. Rickman was not robbed because she surrendered money on orders from her husband not on orders from appellant or Wheeler. However, she said she handed over money following a demand from Wheeler. Moreover, even if her

III. The consecutive sentence imposed for the robbery of Mrs. Rickman was valid.

There was no error in imposing a consecutive sentence for the robbery of Mrs. Rickman. Robbery is an offense against the security of the person. And the words of the statute indicate the legislative intent as to the appropriate unit of prosecution—the robbery of each person is a separate and distinct offense.²⁵ The robbery of two persons occasions twice the social harm sought to be protected against as the robbery of a single individual.²⁶ For this reason we feel there should be little doubt that Congress intended the permissibility of a double penalty to correspond with a double harm.²⁷ Insofar as *Irby v. United States*, *supra*, is applicable to the problem here presented,²⁸

act was in response to her husband's statement, the latter was quite obviously a coerced product of appellant's assault and demand for money. To say that she handed money over because of what her husband did rather than because of what appellant did is to ignore the manifest realities of the situation.

²⁵ 22 D.C. Code § 2901 ("Whoever by force or violence . . . shall take from the person or immediate actual possession of *another* anything of value, is guilty of robbery. . . .") (Emphasis added).

²⁶ See e.g. *United States v. Meyers*, 139 F.Supp. 724 (D. Alaska 1956) (consecutive sentences upheld for contributing to the delinquency of two minors at the same time and place); *Neal v. State*, 35 Cal.2d 11, 357 P.2d 839 (1960) (where gasoline was thrown into the bedroom of a married couple and ignited, consecutive sentences for two counts of attempted murder were upheld in an opinion by Traynor, J.); *People v. Johnson*, 26 Cal. Rptr. 614, 210 Cal. App.2d 273 (1962) (consecutive sentences upheld for robbing more than one person at the same time and place.)

²⁷ The so-called "rule of lenity" only comes into play at the end of the analysis "where there is substantial doubt as to whether Congress would have intended . . . [double punishment] to be imposed." *Irby v. United States*, D.C. Cir. No. 19,988, decided *en banc* November 17, 1967, slip op. p. 3. See *Callanan v. United States*, 364 U.S. 587, 596 (1961).

²⁸ This Court was there divided over whether a single intent motivated the continuous flow of criminal activity which constituted both housebreaking and robbery. If so the housebreaking was perhaps a mere preparatory step to the robbery, a step which by itself violated only a rather insubstantial interest. Here while the

we note that each robbery violated the separate interest which the victim thereof had in the security of his person and appellant and Wheeler could have robbed only one of the Rickman's "in response to the deterrent influence of additional punishment." *Id.* at p. 3, fn. 1, p. 6, fn. 4. There are the tests which the majority had in mind. *Bell v. United States*, 349 U.S. 89 (1955), and *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952), cited by appellant, are distinguishable.²⁹

intent to rob is of course common to both robberies, the commission of each caused a separate and substantial social harm, and neither offense was in any sense a preparation for the other. We urge therefore that the fact of single intent does not militate for single punishment.

²⁹ In *Bell*, consecutive sentences were held improperly imposed on two counts of violation of the Mann Act, each count involving a different woman transported on the same trip in the same vehicle. The essence of the crime charged there was transportation whereas the robbery statute here contemplates the protection of the individual victim. Moreover the criminal activity which constituted one robbery was not the same as that which constituted the other—the taking of money from each victim was a separate act. Compare *Ladner v. United States*, 358 U.S. 169 (1958) (two federal officers wounded by a single shotgun blast). In *Universal C.I.T. Credit Corp.*, the Court discerned a legislative intent to punish only a course of conduct and not separate violations of a similar nature. And we do not perceive the applicability here of the teaching of *Ingram v. United States*, 122 U.S. App. D.C. 334, 353 F.2d 872 (1965), and *Davenport v. United States*, 122 U.S. App. D.C. 344, 353 F.2d 882 (1965). *Ingram* struck down consecutive sentences for assault with a dangerous weapon and assault with intent to kill arising out of a single assault, and *Davenport* invalidated consecutive sentences for manslaughter and assault with a dangerous weapon, again the result of a single assault. In these cases a single act violated a single interest, the security of one person. Moreover, the various statutory assault and homicide sections of the D.C. Code provide penalties increasing with the seriousness of the criminal activity and the harm occasioned thereby. This indicates a legislative intention that the same act cannot be punished as both a more and a less serious statutory violation.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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